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JOSEPH F. SPANIOL, JR.
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No. 89-1542

In The
Supreme Court of the United States
October Term, 1989

BIZCAP, INC.,

Petitioner,

v.

ANTHONY P. OLIVE, Director of Virgin
Islands Bureau of Internal Revenue, and
GOVERNMENT OF THE VIRGIN ISLANDS,

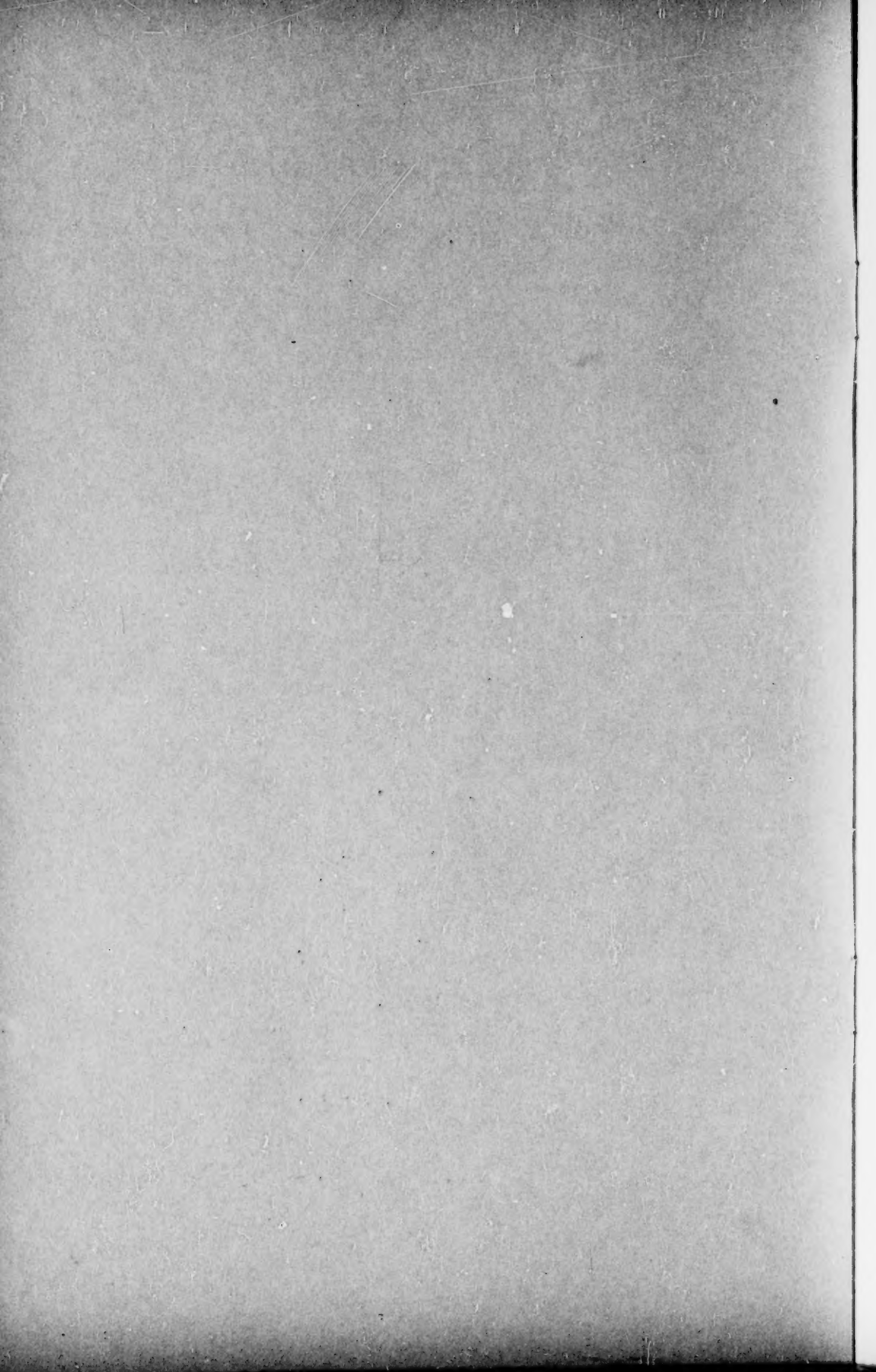
Respondents.

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should a statute that defines rights and obligations by reference to pre-existing legal rules be presumed to require application of those rules as they were understood by Congress at the time of enactment of the new statute, without regard to post-enactment judicial interpretation of the prior law?

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In our petition for certiorari, we demonstrated that this case presents an important and recurring question of statutory construction. First, we showed that section 1277(c)(2)(D) of the Tax Reform Act of 1986 required Petitioner's 1983 and 1984 tax liability to be determined in accordance with the relevant taxing statutes as they stood at the time of enactment of the Tax Reform Act. Second, we illustrated how the Third Circuit Court of Appeals took this to mean that Petitioner "remained liable under the previous tax laws applicable to the Virgin Islands, whatever they were *or were determined to be by our court in Danbury*," Pet. App. A-11 (emphasis added), a decision handed down *after* the effective date of the Tax Reform Act. Third, we argued that the Court of Appeals

should instead have presumed, subject to rebuttal, that the Tax Reform Act called for application of the pre-existing set of legal rules *as they had been uniformly interpreted by the courts at the time of enactment of the new statute*. Finally, we demonstrated that such a presumption, though never expressly set forth by this Court, is consistent with longstanding precedent and required by sound principles of statutory interpretation.

The Respondents answer this argument by misdirection. Stripped of its unnecessary verbiage,¹ the Respondents' argument reduces to three essential propositions:

1) the Court of Appeals did nothing more than to apply the plain meaning rule, Brief in Opp. 8-10;

2) section 1277(c)(2)(D) does not in fact define Petitioner's rights and obligations in terms of the application of pre-existing legal rules, Brief in Opp. 10-12; and, in any event,

3) those pre-existing legal rules were not, as Petitioner claims, "well understood" at the time of enactment of the Tax Reform Act, Brief in Opp. 12-17.

All three propositions reflect a profound misunderstanding of the issues in this case.

The issue raised by our petition does not remotely implicate the plain meaning rule, or any similar rule of

¹ Respondents set forth at some length a counter-statement of the case. Brief in Opp. 1-8. The reason for this exercise escapes us.

statutory interpretation.² We have no quarrel here with the portion of the Court of Appeals' opinion – triumphantly cited by Respondents in their brief, Brief in Opp. 9 – which used the plain meaning rule to determine that section 1277(c)(2)(D) ties Petitioner's fate to pre-Tax Reform Act law. Indeed it does. The question, however, is: what is encompassed by pre-Tax Reform Act law? The answer to that question lies not in the text of section 1277(c)(2)(D), which is indeed as plain as can be, but in the background assumptions lying behind it.

When Petitioner's fate was tied to pre-1987 law, that meant either that Petitioner's tax liability for the years in question should be determined in accordance with legal rules *as they had been interpreted as of October 22, 1986, when the Tax Reform Act was enacted*, or that determination of Petitioner's tax liability *was contingent on future judicial decisions made after enactment of the Tax Reform Act*. The Court of Appeals assumed the latter; we maintain that it should have presumed the former. This issue assuredly concerns the meaning of section 1277(c)(2)(D), but not its *plain* meaning, as one can choose between the competing interpretations only on the basis of rules of construction that serve as part of the background against which the plain meaning of the text must be read.

² Questions concerning plain meaning and legislative intent were discussed at length in the lower courts, but only in connection with issues that are not raised by this petition and are not necessary in that even the Court of Appeals acknowledged that Congress believed it was closing a tax loophole and granting an exception to Bizcap. Pet. App. A-10-11.

The same misunderstanding of the issue involved leads Respondents to suggest that section 1277(c)(2)(D) does not in fact define rights and obligations in terms of pre-existing legal rules, and thus does not present the issue raised by our petition. They describe section 1277(c)(2)(D) as, "pure and simple, a 'grandfather rule.' " Brief in Opp. 11. True enough. But exactly what does it "grandfather" into effect? Obviously, the law as it stood prior to enactment of the rest of the Tax Reform Act. Does that prior law incorporate judicial decisions made subsequent to enactment of section 1277(c)(2)(D)? That, of course, is not obvious, and is precisely the question presented by this case.

| Finally, Respondent suggests that the interpretation of section 1277(c)(2)(D) was not "well understood" at the time of enactment of the Tax Reform Act, and therefore does not satisfy the criteria that we set forth in our petition for application of our proposed interpretative presumption. The short answer to this is that the Court of Appeals declared otherwise. See Pet. App. A-10-11 ("At the time the [Tax Reform] Act was passed, Congress believed the interplay between 26 U.S.C. 822 and 28(a) resulted in a tax loophole"). The longer answer is that this argument misconstrues what it means for a legal interpretation to be "well understood" for purposes of the rule we are proposing. We have never claimed that Congress *acquiesced* in the decision in *Danbury I* creating Bizcap's loophole. We have claimed only that at the time of enactment of the Tax Reform Act, *Danbury I* was the only outstanding judicial interpretation of the relevant statutes, and that Congress was acutely aware of this fact and sought to overturn the decision. This uniformity of

judicial interpretation is significant because, in light of it, adoption of our proposed interpretative rule would permit calculation of Petitioner's tax liability from the moment of enactment of the Tax Reform Act, rather than many years and many lawsuits later. In other words, if Congress had explicitly called for application of "the law as it stands as of October 22, 1986," there would have been a clear referent for that statute. Similarly, if one presumes, as we urge, that section 1277(c)(2)(D) calls for application of precisely such pre-1987 legal rules, there is an unambiguous referent for that presumption as well. That is all that we mean by "well understood." Reams of disagreement over that interpretation by Congress and the IRS do not change the fact that judicial interpretation of pre-1987 law at the time of enactment of the Tax Reform Act was uniform (because it was unitary).

The Respondents have not denied that the question we present is significant and worthy of plenary review. They have claimed only that this case does not present this significant and worthy question. With all due respect, that claim rests on a patent misunderstanding of the nature of our argument and the holding of the Court of Appeals. The question is important, and this case squarely presents it. The petition should be granted.

Respectfully submitted,

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